Date: May 29, 1998
Case No.: 98-TLC-11

In the Matter of:

NEWSHAM HYBRIDS (USA), INC.,
Employer.

Appearances: Kimberley A. Chandler, Esq.,
for Employer

Marilyn W. Zola, Esq.,
for the U.S. Department of Labor

BEFORE: JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184 and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B.[1] This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. §655.112(a)(2). Newsham Hybrids (USA), Inc. (hereafter "Employer") has requested expedited review of the decision by a U.S. Department of Labor Certifying Officer ("CO") denying its application for temporary alien agricultural labor certification for ten Livestock Workers (Swine) to work from July 1, 1998 until June 30, 1999, based on the finding that the job is permanent (AF 10-11).[2] The standard of review is "for legal sufficiency" of the record. §655.112(a)(1).[3] Pursuant to §655.112(a)(2), this Decision and Order constitutes the final decision of the Secretary of Labor.

[1] Unless otherwise noted, all regulations cited in this decision are in Title 20.

[2] References to the Appeal Filed are abbreviated "AF".

[3] In contrast, review under §655.112(b) allows for a *de novo* evidentiary hearing to be conducted.

STATEMENT OF THE CASE

Background

On March 11, 1998, Employer filed forms ETA 750A and 790 seeking to fill ten positions of "Livestock Worker (Swine)" for the period of July 1, 1998 until June 30, 1999 (AF 27-39). On March 25, 1998, the CO issued a letter proposing to deny Employer's application on the grounds that Employer failed to offer the prevailing wage and because "[t]he duties of the job . . . are not temporary and there is no reason given to substantiate the notion that the job is temporary and a continuing need will not exist for workers to do the same job beyond the ending date of need." (AF 23-25). Thus, the CO instructed Employer as to how it could correct the deficiencies or defend its position. Employer timely responded, accepting the CO's findings as to the prevailing wage and providing documentation of its expansion plan along with a letter from Employer attesting to its temporary need for the petitioned for workers (AF 14-22). Employer states that its expansion plan makes it necessary to hire about 23 employees in a relatively short period of time, and given the lack of a local hiring pool, it needs to temporarily supplement its workforce with alien labor (AF 30). Employer anticipates being able to replace the alien workers over time, but cannot do so in the short-term. On May 13, 1998, the CO denied the application (AF 10-11). The CO accepted Employer's offer to amend the prevailing wage, but denied the application pursuant to §655.100(c)(2)(ii) on the grounds that the job is permanent.

Employer's Brief

Employer, through counsel, argues that because its need is temporary, the application should be certified (Employer's Brief at 1-2). Employer recites the definitions set forth in the regulations at §655.100(c)(2)(i) and (iii), as well as the Department of Labor's H-2A Program Handbook in support of this position. Further, Employer asserts that it has met its burden of showing that its need is temporary (Employer's Brief at 3-4). Employer explains that it is about to undergo an expansion of business, and because the expansion is into areas that are not highly populated, it needs temporary workers. Employer expects that it will have to hire outside of the state and re-locate workers, a task which it cannot do prior to establishing itself and the new facility in the new area. Employer also argues that it is error for the CO to substitute his judgment for Employer's in deciding what Employer's needs actually are. Lastly, Employer argues that the application should be accepted because a prior, identical application had been accepted, although not pursued.

Solicitor's Brief

The Solicitor, as counsel for the CO, argues that Employer's application and arguments fail because it merely asserts a need for 364 days of labor but does not tie the period to a predictable event (Solicitor's Brief at 5 *citing* ***Kentucky Tennessee Growers Ass'n, Inc., et al.***, 98-TLC-1 and 2, *slip op*. at 6 (Dec. 16, 1997)). The Solicitor also argues that Employer's need does not qualify as "temporary" nor does it qualify as a "one-time occurrence" because, as stated

by Employer, it has 6 years of experience in this business and continually has difficulty in fulfilling its hiring needs. (Solicitor's Brief at 4-6). Quoting ***Matter of Artee Corp.***, 18 I. & N. Dec. 366 (Comm. 1982), the Solicitor frames the inquiry as "[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position. The primary question in determining whether Newsham's need is temporary is whether Newsham can establish that it has not employed livestock workers in the past and will not need the services of livestock workers in the near, definable future. (Solicitor's brief at 5 *citation omitted*). Further, the Solicitor argues that Newsham's claims of "a worker shortage does not transform a need for permanent workers into one for temporary workers under the H-2A program." *Id*. at 6 *citing* ***Volt Svs. Corp. v. I.N.S.***, 648 F.Supp. 578, 581 (S.D.N.Y. 1986); ***Sussex Eng'g v. Montgomery***, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

The Regulations

The regulations governing H-2A nonimmigrant, temporary agricultural employment define "of a temporary or seasonal nature" as follows:

> Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.
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> A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

§655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20). The regulations go on to define "temporary" as

> . . . any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances pursuant to §655.106(c)(3) of this part.

§ 655.100(c)(2)(iii).

In 1987, the Secretary of Labor revised the regulations governing temporary alien agricultural labor certification, and a review of the history of the rulemaking adds insight into the application of the regulatory definition of "temporary or seasonal". *See* 52 Fed. Reg. 16,770 (1987) (proposed May 5, 1987); 52 Fed. Reg. 20,496 (1987) (interim final rule June 1, 1987); 52 Fed. Reg. 20, 507 (1987) (codified at 20 C.F.R. pt. 655). The rulemaking indicates that the Department's interpretation of the word "temporary" under the H-2 provision is intended to be consistent with the common meaning of the word "temporary," and to have the same meaning for both H-2A and H-2B purposes. 52 Fed. Reg. 20,497 (1987) (interim final rule June 1, 1987). In stating this, the Department accepted the administrative and judicial interpretation as set forth in the leading case ***Matter of Artee Corporation***, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). ***Artee*** held that what is relevant in determining whether an employer has made a *bona fide* H-2 application is "whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling." *Id*.[4] Thus, the regulatory history of DOL's temporary labor certification rules provides that:

> [i]t is irrelevant whether the job is for three weeks to harvest berries or for six months to replace a sick worker or for a year to help handle an unusually large agricultural contract. What is relevant to the temporary alien agricultural labor certification determination is the employer's assessment . . . of its need for a short-term (as opposed to permanent) employee. The issue to be decided is whether the employer has demonstrated a temporary need for a worker in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is <u>whether the employer's need is truly temporary</u>.

52 Fed. Reg. 20,497 - 20, 298 (1987) (interim final rule June 1, 1987) (<u>emphasis added</u>).

The regulatory history does not closely examine the meaning of the word "seasonal". It is indicated, however, that the meaning ascribed to the word "temporary" "will not be a problem for much of agriculture, which uses workers on a seasonal basis." *Id.* at 20, 497. The regulatory history also indicates that: "Of course, with respect to truly 'seasonal' employment, it is appropriate and should raise no issue for an employer to apply to DOL each year for temporary alien agricultural labor certification for job opportunities recurring annually in the same occupation." *Id*. at 20,498.

Hence, a temporary agricultural labor certification application must be accompanied by a statement establishing either: (1) that an employer's need to have the job duties performed is

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[4] The position in ***Artee*** that the burden is on employer to establish that the need for the H-2 worker is only temporary has been affirmed by several courts. ***Wilson v. Smith***, 587 F. Supp. 470 (D.D.C. 1984); ***Volt Technical Services Corporation v. INS***, 648 F. Supp. 578 (S.D.N.Y. 1986); ***North American Industries, Inc. v. Feldman***, 722 F. 2d 893 (1st Cir. 1983); ***Sussex Engineering, Ltd. v. Montgomery***, 825 F. 2d 1084 (6th Cir. 1987).

"temporary" -- of a set duration and not anticipated to be recurring in nature; or (2) that the employment is seasonal in nature – that is, employment which ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. *See* §655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20).

DISCUSSION

An "H-2A" worker is an individual "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a *temporary or seasonal nature*." 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (*emphasis added*). Pursuant to §655.101(g), "[t]he employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA[5] that the need for the worker is 'of a *temporary or seasonal nature*', as defined at §655.100(c)(2) of this part. Job opportunities of 12 months or more are presumed to be permanent in nature." §655.101(g) (*emphasis added*). The issue herein is whether Employer set forth on its application that the job opportunity is for agricultural labor or services of a *temporary or seasonal nature*.

Initially, I note that the Solicitor's reference to definitions in the INS regulations for H-2B visas of "one-time occurrence" is irrelevant to a determination herein on the "temporary or seasonal nature" of the job opportunities. *See* 52 Fed. Reg. 20,497 - 20, 298 (1987) (interim final rule June 1, 1987). Likewise, Employer's reference to certification of a prior identical application is irrelevant to the application at bench.

Keeping in mind that the purpose of the regulations is to protect the U.S. work force, §655.90(d), even though the application is for a period of less than one year, I do not find that Employer established a truly temporary need for these workers. This finding is not an attempt to replace my judgment for the Employer's. Rather, it is based on Employer's failure to demonstrate a temporary need for these workers. Employer has confused the issues. The first issue to decide is whether the job opportunity on the application is for agricultural labor or services of a *temporary or seasonal nature*. If that is answered in the affirmative, and it is found that the wages and working condition of the job offer are such that it will not adversely effect the wages and working conditions of U.S. workers similarly employed, then the second issue is addressed; that is, whether there are sufficient U.S. workers in the labor market to fill the petitioned for positions. Employer's argument that it needs the workers because of the limited workforce in the area of intended employment is premature.

Further, I do not find that the employment is seasonal in nature because it is continuous and may be carried on throughout the year. *See* §655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20).

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[5] Under the regulations, the determination of whether to accept an application for consideration and whether to certify the application is made by the Regional Administrator ("RA"); however, the regulations permit the RA to delegate that responsibility to a staff member. §655.92. Thus, in this matter, the Certifying Officer made the determination.

Acknowledging that agricultural work, by definition is seasonal and recurring in nature, when seeking the benefits of this program, the work cannot be of the sort that may be carried on throughout the year. Employer is seeking temporary labor certification for 364 days, for workers to work through two entire breeding and farrowing cycles, at two different farms because of an anticipated hiring problem. However, Employer does not explain how it determined that it would be able to fulfill its hiring needs from the domestic market in one day short of one-year, rather, than in six months or one breeding and farrowing cycle. Maybe after staffing the first new facility, Employer would discover that it was easier to hire U.S. workers than it anticipated. Employer has failed to establish that the work is either "temporary" or "seasonal", and the application suggests an artificial termination of employment in an attempt to qualify the work as temporary rather than permanent.

Based upon my review of the record for legal sufficiency, I find that the CO has set forth a legally sufficient basis for denying this application for temporary alien agricultural labor certification (for H-2A workers). Conversely, Employer has not asserted a legally sufficient basis for the application to be granted. Accordingly, I must affirm the CO's denial of temporary alien labor certification.

ORDER

The determination of the Certifying Officer in the above case is hereby **AFFIRMED**.

SO ORDERED.

JOHN M. VITTONE
Chief Administrative Law Judge